

NOV 22 2006

Clements | Walker

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Date: November 22, 2006

To: Bill Krynski - USPTO - Technology Center 1700

FAX No.: 571-273-8300

From: Gregory N. Clements

No. of Pages: 12 (including cover sheet)

Re: Serial No. 09/837,094
Docket 3129

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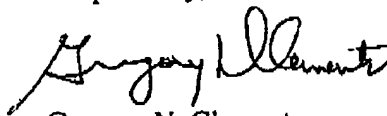
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PLEASE CONFIRM RECEIPT OF THIS TRANSMISSION

Dear Mr. Krynski:

A copy of the petition for the above-referenced application that was filed 11/22/06 is being forwarded to you for your benefit.

Respectfully,



Gregory N. Clements

GNC/nb
Enclosure

- As indicated

Clements | Walker

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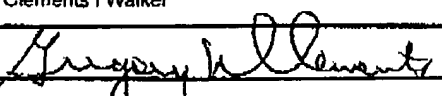
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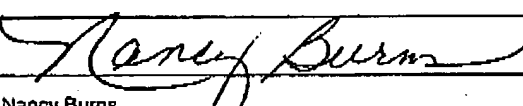
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TRANSMITTAL FORM (to be used for all correspondence after initial filing)	Application Number	09/837,094	
	Filing Date	04/18/2001	
	First Named Inventor	Sheppard, Jr.	
	Art Unit	1771	
	Examiner Name	Belumo, Jenna Leigh	
Total Number of Pages in This Submission	11	Attorney Docket Number	3129

ENCLOSURES (Check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input checked="" type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input type="checkbox"/> Power of Attorney, Revocation <input type="checkbox"/> Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary Information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below):
Remarks certificate of express mailing return receipt postcard		
SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT		
Firm Name	Clements Walker	
Signature		
Printed name	Gregory N. Clements	
Date	November 22, 2006	Reg. No. 30,713

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Typed or printed name	Nancy Burns	Date November 22, 2006

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

COPY

Applicant) James M. Sheppard JR.
Application No.) 09/837,094
Filed) 04/18/2001
Title) JACQUARD OR DOBBY WOVEN TEXTILE
WITH GRAPHIC IMPRESSION AND A
METHOD OF MAKING THE SAME
Examiner) Befumo, Jenna Leigh
Art Unit) 1771
Attorney Docket) 3129

Charlotte, North Carolina
November 22, 2006

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

Petition under 37 CFR § 1.181

Dear Sir,

The Director is asked to invoke his supervisory authority and direct the examiner to withdraw the dismissal of the appeal and resulting abandonment of the above captioned application and restore the application to "pending" status. In addition, the Director is asked to instruct the examiner that the Amended Appeal Brief, filed August 3, 2006, is in compliance with the provisions of 37 CFR § 41.37 with or without the proposed amendment to the Brief discussed below and should be taken up for consideration on the merits.

This application is related to Application No. 09/747,529. Both applications are being examined by the same examiner and she has taken the same action in each

NOV 22 2006

application. A petition is being filed concurrently in the related application. It is requested that the two petitions be considered together.

Statement of Facts

1. A first Appeal Brief was filed on May 15, 2006.
2. The examiner entered a "Miscellaneous Action" on July 5, 2006.
3. The "Miscellaneous Action" included a "Notice of Non-Compliant Appeal Brief."
4. In relevant part, the examiner objected to the "Summary of Claimed Subject Matter" section required by 37 CFR § 41.37(c)(1)(v).
5. The examiner set forth two reasons why the "Summary of claimed subject matter" section was deemed not to comply with this section of the rules:
 - a. The summary should be limited "only to the subject matter being claimed in the appealed claims and not a summary of the entire disclosure." Box 10 of notice of non-compliant brief.
 - b. The summary should "map each claimed feature to where it is discussed in the disclosure." *Id.*
6. Appellant filed an Amended Appeal Brief on August 3, 2006.
7. In regard to the first objection raised by the examiner, appellant cited to the commentary accompanying the appeal rules at page 1 of the cover letter of the Amended Appeal Brief as follows:

The determination of how "concise" the explanation must be will need to be determined on a case-by-case basis. If the prosecution and examination has been based upon a discussion of the patentability of individual claims instead of the "invention," it is expected the explanation will be more "concise" than if the prosecution and examination has been conducted on the basis of the "invention." As to what is required, the proposed rule states that reference to the specification by page and line number, and to the drawing, if any, by reference characters is required. *Appellant may include any other information of record which will aid the Board in considering the subject matter of each independent claim.* 49976 Federal Register / Vol. 69, No. 155 / Thursday, August 12, 2004 / Rules and Regulations, Comment 53.

8. In regard to the second objection raised by the examiner, appellant provided a claim chart for the independent claim on appeal, claim 21.
9. The claim chart appears as Table 1 at page 15 of the Amended Appeal Brief.
10. The claim chart is explicitly referenced in the "Summary of Claimed Subject Matter" section of the Amended Appeal Brief. See pages 4-5 of the Amended Appeal Brief.
11. The examiner entered a second "Miscellaneous Action" on November 7, 2006.
12. The Miscellaneous Action included a "Communication Re: Appeal."
13. The communication stated that the appeal was dismissed (Box 3) and that the case was abandoned (Box 4).
14. The examiner states at page 2 of the communication, that appellant "explicitly declined to correct the informalities noted by the examiner."
15. The examiner also states two reasons in the communication why the "Summary of the claimed subject matter" section of the Amended Appeal Brief was improper:
 - a. "The Summary is not directed to the claimed invention, but rather, features not represented in the claims. That is, it represents a summary of the disclosure, not the claims."
 - b. "[T]he Summary does not identify which independent claim is being summarized, if any, nor identify where the features and claims are found in the specification. Additionally, the table provided by Appellant is not found in the Summary and cannot be considered part of the Summary."
16. In regard to reason a., the examiner did not acknowledge that the commentary to the appeal rules expressly states appellant can provide any additional information believed to aid the Board in understanding the claimed subject matter.
17. In regard to reason b., the examiner did not explain why 37 CFR § 41.37(c)(1)(v) or cite any other authority that prohibits reference to a

claim chart in the "Summary of claimed subject matter" section of an appeal brief.

Analysis

37 CFR § 41.37(c)(1)(v) provides in relevant part:

Summary of claimed subject matter. A concise explanation of the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters.

As seen, the rule neither prescribes, nor proscribes a particular format or manner in which the required information is to be arranged in an appeal brief. Nor does the rule prohibit the addition of additional information from the record of the application under appeal that appellant believes would aid the Board to come to an understanding of the subject matter of a claim. Thus, both reasons a. and b. given by the examiner in support of her decision to dismiss the appeal and abandon the application are without authority and constitute, at the least, an abuse of discretion.

In regard to reason a., appellant pointed out in the cover letter of the Amended Appeal Brief that the commentary to the appeal rules expressly states that "Appellant may include any other information of record which will aid the Board in considering the subject matter of each independent claim." 49976 Federal Register / Vol. 69, No. 155 / Thursday, August 12, 2004 / Rules and Regulations, Comment 53. The examiner did not acknowledge or respond to this portion of appellant's response in maintaining reason a.

In regard to reason b., appellant decided to arrange the Amended Appeal Brief by making reference to Table 1 in the Summary of claimed subject matter section instead of physically including Table 1 at the portion of the brief for the convenience of the reader. It was thought that the claim chart set forth in Table 1 would be printed separately by the reader and relied upon as a resource while the reader was considering the remainder of the Amended Appeal Brief, including the "Summary of the

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claimed subject matter" section. Again, the rule does not prohibit reference in this section of an appeal brief to a table that is physically located at a different place in the appeal brief. The examiner does not cite to any other authority in support of her determination that the Amended Appeal Brief is non-compliant for this reason. The examiner is without authority to impose her own subjective view of how an appeal brief should be organized and make requirements as here that are not required by 37 CFR § 41.37.

Relief Requested

Alternative 1

The Director is requested to invoke his supervisory authority and direct the examiner to withdraw the abandonment of the application, reinstate the appeal, find the Amended Appeal Brief to be in compliance with 37 CFR § 41.37 and consider the brief on the merits since, for the facts and reasons set forth above, the examiner's actions in dismissing the appeal and abandoning the application are, at the least, an abuse of discretion, if not arbitrary and capricious.

Alternative 2

The examiner set forth her subjective desire to have Table 1 physically incorporated in the "Summary of claimed subject matter" section of the Amended Appeal Brief for the first time in the "Communication Re: Appeal" issued November 7, 2006. Importantly, the examiner did not criticize the substance of Table 1 so it can be reasonably assumed that Table 1 complies with the requirement of 37 CFR § 41.37(c)(1)(v) to explain "the subject matter defined in each of the independent claims involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters." Since appellant has not had an opportunity until now to consider the examiner's subjective requirement, a copy of an

amended "Summary of the claimed subject matter" is attached in an attempt to comply with this new requirement.

In the alternative, the Director is requested to invoke his supervisory authority and direct the examiner to withdraw the abandonment of the application, reinstate the appeal, find the Amended Appeal Brief of August 3, 2006, as further amended by the accompanying "Summary of claimed subject matter" section, to be in compliance with 37 CFR § 41.37 and consider the brief on the merits. Since appellant was not given an opportunity to comply with the examiner's subjective requirement as to how the Amended Appeal Brief is to be organized, her actions in dismissing the appeal and abandoning the case were an abuse of discretion, if not arbitrary and capricious.

FEES

It is not believed that any fees are due with this petition.

Attachment*SUMMARY OF CLAIMED SUBJECT MATTER (37 C.F.R. § 41.37(c)(1)(v))*

Table 1, immediately below, maps each claimed feature of independent claim 21 to its relevant disclosure in the Application.

TABLE 1

Claim 21

Stark v. Parker v. Sherrill

Weaving a towel on a Dobby loom using at least 2 different colors. Application as filed (A.A.F.), page 6, paragraphs 4 - page 7, paragraph 1.	Stark does not disclose a specific weaving loom.
	Parker utilizes a Jacquard loom.
	Sherrill does not disclose a specific weaving loom.
Such that a border having a first darker color is woven adj. each edge on one side thereof. A.A.F., page 6, paragraph 5 - page 7, paragraph 3; page 8, paragraph 2.	Neither Stark nor Parker has this. Sherrill has a border defined by printing.
And a border having a second lighter color is woven adj. each edge of said towel on the other side. A.A.F., page 6, paragraph 5 - page 7, paragraph 3; page 8, paragraph 2.	Neither Stark nor Parker nor Sherrill has this.
Said towel having a central area woven within the borders on both sides. A.A.F., page 7, paragraph 3; page 8, paragraph 2.	There is a central area but no borders. Sherrill has a central area on only one side.
Said central area on other side is woven with 1 st color. A.A.F., page 7, paragraph 3; page 8, paragraph 2.	There is a central area but no borders.
Said central on said one side is woven in a 2 nd color. A.A.F., page 7, paragraph 3; page 8, paragraph 2.	There is a central area but no borders. Sherrill's border is same color as central area.
Forming a graphic impression in said central area on said one side. A.A.F., page 8, paragraph 2 - page 9, paragraph 1.	Park discloses printing, but not within a central area. Sherrill discloses this.
Said border on said one side is capable of masking said graphic impression that may overlap onto said border from said central	Neither Stark nor Parker nor Sherrill has this.

area on said one side. A.A.F. page 8, paragraph 3 - page 9, paragraph 1; page 10, paragraph 2; figure 3.	
Said central area on said second side is capable of masking any potential bleed through of said graphic impression from said central area of said one side. A.A.F. page 8, paragraph 2 - page 9, paragraph 2.	Neither Stark nor Parker nor Sherrill has this.

In the weaving of terry toweling, three series of yarns are employed: (a) pile warp which produces the loops for the pile surface (b) ground warp from which the pile warp projects and (c) weft which binds the two warps together.

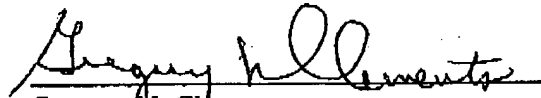
Pile warp that is not utilized on the front pattern surface can be woven into terry loops on the reverse side of the textile, woven into the ground warp and weft fibers to create a non-looped, flat weave on the reverse side, or allowed to "float" as unwoven fibers along the backside. This limits the utility for these types of articles, since many designs and logos cannot be adequately reproduced within the confines of the dobby weave.

Printing processes on dobby fabrics have been limited to preprinting the warp filaments with an elongated vertical pattern such that when woven, an article with more than two colors can be achieved. This process requires elaborate computer controlled printing onto the filaments, and very precise monitoring of the weaving process. Printing a pattern post-weave on an article has been employed in dobby situations, but this results in an article that is largely limited to a single color on the nonprinted side of the article. Printing on the reverse side of the dobby article is largely prohibited due to the likelihood that the separately printed images on opposite sides of the article will bleed through the article and disfigure the images on both printed sides. Post printing also has the undesirable side effect of decreasing the absorbency of the towel.

Appellant has recognized the deficiencies of both the weaving process and the traditional printing process and has created the novel "Edge® Towel," an embodiment of

Claim 21. Claim 21 uses dobby weaving to create a towel having central light colored area, surrounded by a dark border. The reverse side of the towel is a dark colored central area surrounded by a light colored border. A design can be printed in the light colored central area of the first side. The dark colored border surrounding the light central area is capable of masking any printed pattern that might overlap onto the border from the central area. This eliminates the need for precise alignment and monitoring that is mandatory in the preprinted filament process. Likewise, the dark central area on the reverse side of the article is capable of masking any potential bleed through of the printed design on the light colored central area of side one. This allows the printed image to be applied so as to result in a graphic that is more intensely colored than woven articles that are limited to a single front and rear color.¹

Respectfully submitted,



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¹ U.S. Pat. App. No. 09/837,094 as filed, page 9, paragraph 1.